FOIA Litigation

Everything you wanted to know but were afraid to ask

Receipt of Suit

- How does DoD learn that the agency has been sued?
- Who will represent the agency in court?
- What part does the agency's general counsel's office play?
- Federal Programs Branch, Civil Division, U.S. Department of Justice

Jurisdiction & Venue

- **Jurisdiction**

  United States District Courts

- **Venue**

  In which federal jurisdiction may a requester file a lawsuit?

Pleadings

- The Complaint
  - Who is a proper party defendant?
  - Service of process
- The Answer
  - Filed within 30 days of service upon the proper party
  - Must respond to each allegation
  - Must assert affirmative defenses

Discovery

- What is discovery?
- Forms of discovery:
  - Interrogatories
  - Requests for admissions
  - Depositions
- Scope of discovery in FOIA lawsuits
- Adequacy of search and discovery

What is the suit about?

- Generally, there are 3 reasons why suits are filed
  - Denial of expedited processing/fee waiver
  - Complaints over the adequacy of DoD's search/response
  - Complaints over the redactions taken

What is the suit about? **Denial of expedited processing**

- Some requesters ask DoD to grant expedited processing. If the FOIA office denies that request, a suit may be filed.
- Standard to grant expedited processing: can the requester can show an exceptional need or urgency for the info requested
- Admin determination made by FOIA office

What is the suit about? **Denial of fee waiver**

- Most requesters must pay fees
- Standard for granting fee waiver: if disclosure would significantly increase public understanding about government operations/activities and is not primarily in the commercial interest of the requester

Court decides EP/Fee Waiver issue

- Cases resolved by motions practice
- If the court grants EP, then requester goes to end of EP queue
- If the court denies, they go to end of regular queue
- If the court grants fee waiver request, DoD must process
- If the court denies fee waiver request, we do not process without a prior commitment to pay, and do not provide docs without $

What is the suit about?
Adequacy of Search

- Agencies must conduct a search that is “reasonably calculated to uncover all relevant documents.”
- Must search everywhere it is reasonably likely that responsive records exist

Adequacy of Search/Response

- Factors:
  - Were the correct components tasked?
  - Are we satisfied that they conducted an adequate search, not only where they searched, but what they searched for?

What is the suit about? **What DoD redacted**

- At some point in the litigation process, plaintiff complains about the redactions that we have taken
- These issues are best resolved in our favor when you make sure that our positions are consistent across DoD and ensure that the redactions are supported by adequate Vaughn indices and Declarations

Complaints over Redactions

- FOIA requires that agencies review each document, line by line, to determine if there is non-exempt information that can be segregated out for release
- Courts are often interested in ensuring that the agency has complied with this requirement

Redactions

- Logistics:
- A clean copy of the documents should be bates stamped before redactions begin
- Redactions should be marked on the document with the FOIA exemption being claimed in the margin

Referrals/Consultation

- Referrals-your file contains documents that originated with another agency.
- Consultation-your file contains documents that contain information that originated with another agency.

Referrals

- Logistics
  - Are the referrals going directly from component to component/agency or are they going through the OSD FOIA office?
  - Who is going to respond to the requester?
  - Advantages of going through the FOIA office is that you know where things are
  - Disadvantages are that it adds time to the process

FOIA Exemptions

- B(1)-exempts material that is currently AND properly classified

Compilation

- Compilation/mosaic-providing apparently harmless pieces of information that can be cobbled together to reveal classified info
- Compilation is a valid reason to exempt info

FOIA Exemptions

- B(2)
  - Low-exempts trivial matters that the public would have little interest in (today's lunch menu)
  - High-exempts material that would allow the recipient to circumvent DoD rules and/or procedures (Rules of Engagement)

FOIA Exemptions

- B(3)-exempts material that is identified by statute as being exempt from release
- Example-10 USC 130(b) protects names of DoD personnel in overseas, sensitive or routinely deployable units

FOIA Exemptions

- B(4)-exempts material that is proprietary to a commercial entity-think Trade Secrets
- Short answer is that if it appears that the material is proprietary, we need to notify the entity that provided it to us and give them the opportunity to contest its release

FOIA Exemptions

- B(5)-”Inter-agency or intra-agency documents that would not be available by law to a party other than an agency in litigation with the agency.”

FOIA Exemptions

- B(5)-Pre-decisional AND deliberative material OR
- Material that would be protected under civil discovery rules
  - Attorney work-product privilege
  - Attorney client privilege

FOUO

- Stamping FOUO on a document does not carry the day
- You need to analyze the document to see if it fits under one or more of the FOIA exemptions (usually b5)

FOIA Exemptions

- B(6)-exempts privacy material
  - Medical records
  - Personally identifying information (ssn’s, email addresses)
  - To fit under the exemption, disclosure of the information would need to constitute a clearly unwarranted invasion of personal privacy

Names Policy-Exemption b(6)

- DoD names policy-2001 DepSecDef memo
- Names of military personnel below the GO/FO rank are usually redacted
- Names of civilians GS-15 and below are usually redacted
- Exception for those who routinely deal with the public (PAO, base commanders)
- We have been sued several times over this policy and have won each suit

FOIA Exemptions

- B(7)-exempts law enforcement material
- Protects material found in “records compiled for law enforcement purposes, the disclosure of which would result in harm
- Six sub-exemptions (a-f)

Now what?

- You've ensured an adequate search;
- You've taken the appropriate exemptions;
- A copy of the responsive documents has been provided to the plaintiff;
- How do you resolve the litigation?

Summary Judgment

- FOIA litigation resolved by motion
- Usually no disputed facts, only question of how the law applies to facts
- No live testimony, submission of sworn statements
- *Vaughn* declarations

Vaughn Index and Declarations

- All redactions must be described in a Vaughn index and supported by a declaration (similar to an affidavit)
- If adequately prepared, great deference is given by the court to the declarations and Vaughn indices when determining if summary judgment is appropriate

Vaughn index

- Very similar to a privilege log
- Index must list all documents for which any redactions are taken and provide the basis of the redactions
- Index must be detailed enough for a judge who knows nothing about the case to decide whether or not the redactions are appropriate under the law

Declarations

- Identify declarant-why is this person signing?
- Set forth procedural history of request
- Describe search for responsive records
- Describe records (or portions) withheld
- Identify exemptions claimed and provide all required elements to claim that exemption

Vaughn Declarations

- Contents:
  - Identify declarant
  - State the number of records/pages being withheld and the number of pages released (in full or in part)
  - Set forth procedural history of request, including relevant correspondence
  - Describe the search for responsive records

Vaughn Index

- The Vaughn Index
  - Describe records or portions of records withheld
  - Identify each exemption claimed
  - Connect each item withheld with the exemption asserted
  - Demonstrate that all required elements of each exemption are satisfied

Types of Vaughn Indices

Traditional Vaughn index

- Document-by-document, page-by-page, line-by-line description of withheld information
- Useful when there are relatively few documents at issue

Types of Vaughn Indices

- "Coded" Index
  - Useful for high-volume, multiple-exemption cases
  - Two parts:
    - Assigns an exemption code to each category of withheld information, for example (b)(7)(C)-1 for names of FBI Special Agents, (b)(7)(C)-2 for information that would identify a subject of an FBI investigation
    - Attach copies of redacted records with appropriate code marked next to each deletion

Types of Vaughn Indices

- Categorical or generic index
  - Most frequently used in Exemption 7(A) cases
  - Assigns a functional category to each type of record involved and describes how disclosure would harm on-going law enforcement proceedings

Types of Vaughn Indices

- “Vaughning” only a sample of records
  - Used with a very large number of documents
  - Requester and court must agree to using this type of declaration
  - Sample by full document rather than by page
  - If court disapproves of application of exemptions, may need to reprocess all records

Alternative to Vaughn Index

- FOIA expressly authorizes *in camera* inspection of records as alternative to filing Vaughn declaration
- Judge does not need a security clearance to review classified material, but law clerks do
- Physical security precautions needed

Alternative to Vaughn Index

- *In camera* inspection conducted at discretion of the judge
- Done most often when agency's declaration found to by insufficient or when agency is found to have acted in bad faith

Special “Vaughning” Problems

- Exemption 1
  - “Foreign government information”—identify country, if possible and/or relationships between nations that could be impaired-harm is presumed.
  - “Intelligence activities, sources or methods”
    - If possible, state whether an activity, a source or a method is at issue
    - If possible, state general nature of the activity, source or method

Types of Vaughn Declarations

- "Glomar" denial declaration
  - Used only when an agency cannot confirm or deny the existence of records because it would reveal an exempt fact
  - "Records withheld" section of declaration explains only what abstract fact would be disclosed if agency confirmed that there were or were not records
  - Used most often for targeted requests involving Exemptions 1, 6 or 7C

Special “Vaughning” Problems

- Exemption 2
  - Explain why information is “internal”
  - State whether withheld information is “high 2” or “low 2,” and if “high 2,” state how circumvention of agency regulation, practice, or program would result from disclosure

Special “Vaughning” Problems

- Exemption 3
  - Identify the federal statute being applied
  - Explain how the statute applies to the withheld information

Special “Vaughning” Problems

- Exemption 4
  - When agency is relying on substantial competitive harm argument, you might include a declaration from submitter explaining competitive harm
  - Make clear that agency considered submitter’s views on substantial competitive harm but made independent decision

Special “Vaughning” Problems

- Exemption 5
  - Explain whether the communication was inter- or intra-agency
  - Deliberative process privilege
    - Explain why information is predecisional
    - Explain why information is deliberative
    - State that all factual information has been disclosed or explain why it has not

Special “Vaughning” Problems

- Attorney work product privilege
  - Identify on-going or anticipated litigation and how document pertains to it
  - Attorney client privilege
  - Explain how disclosure would identify confidential information provided by a client to the attorney in order to obtain legal advice

Special "Vaughning" Problems

- Exemption 6
  - Describe privacy interest
    - Whose interest is involved and how is this personal information
    - Describe any particular harm from disclosure
    - If information is old, address whether subject is still living
  - Discuss whether there is any legitimate public interest, and assign it a magnitude

Special "Vaughning" Problems

- Exemption 6 (cont'd)
  - State that the agency has balanced the privacy interest and the public interest, and that the privacy interest prevails

Exemption 7 (all subparts)

- State the law enforcement purpose for which the records were created

Special "Vaughning" Problems

- Exemption 7 (cont'd)
  - (b)(7)(A)
    - State that all categories of information which could not reasonably be expected to interfere with law enforcement proceedings have been disclosed
    - Describe the information withheld in functional categories
    - Explain how disclosure of each function category could reasonably be expected to cause an identifiable harm

Special “Vaughning” Problems

- (b)(7)(C)
  - See Exemption 6 above
- (b)(7)(D)
  - If not a criminal/national security investigation, state that only information that could reasonably be expected to identify the confidential source has been withheld
  - If a criminal/national security investigation, describe investigation without revealing exempt information

Special "Vaughning" Problems

- (b)(7)(D)
- State whether the confidential source was given an express or implied promise of confidentiality
  - If dealing with implied promise of confidentiality, state the circumstances giving rise to the implied promise

Declarations

- The declaration must describe all of the types of redactions set out in the Vaughn index and explain why they were taken
- Review sample declarations to get a sense of what needs to be provided
- Drafts need to be provided to the AUSA before they are signed. Invariably, there are numerous changes suggested by the AUSA

Declarations

- If a component is claiming that portions of the information is classified, a declaration will need to come from the Original Classifying Authority or his/her designee
- The OCA will need to state that they have reviewed the material and determined that it is still properly classified

Duty to Segregate

- Declaration must specifically state that agency has disclosed all reasonably segregable non-exempt information
- If possible, give examples of the agency's efforts to disclose segregable non-exempt information
- If possible, describe the non-exempt information that was not disclosed

Waiver of Exemptions in Litigation

- Because judicial review is *de novo,* exemptions may be asserted in litigation even thought they were not previously relied upon in the administrative stage of processing the request
- All exemptions must be asserted in the agency's *Vaughn* declaration

Waiver of Exemptions in Litigation

- District courts very reticent to permit assertion of new exemption after adverse decision
- Unlikely that agency will be permitted to assert a new exemption on remand after a court of appeals rules that the agency's first asserted exemption inapplicable

OPEN Government Act of 2007

- Section 3 expands definition of news media
- Section 4 attorney fees
- Section 5 disciplinary actions for arbitrary and capricious denials of requests
- Section 6 new time limits

OPEN Government Act of 2007

- Section 3-check with OFOI on who is a representative of the news media and what that means for the processing of their request

OPEN Government Act of 2007

- Section 4-Attorney Fees
  - Substantially prevailed if plaintiff obtained relief through either judicial order or enforceable written agreement or consent decree OR voluntary or unilateral change in position by the agency
  - Fees are now paid by agency funds, rather than DOJ claims and judgment fund

OPEN Government Act of 2007

- Section 5-Disciplinary actions
  - If court orders production of any material and finds that the agency acted arbitrarily and capriciously, Special Counsel shall promptly institute a proceeding to determine if disciplinary action is appropriate against the employee who was primarily responsible for withholding

OPEN Government Act of 2007

- Section 6-New time limits
  - Time starts when either received by the correct FOIA office or within 10 days of being received by any component FOIA office
  - Can make one request to requester for additional info, and can wait for that info
  - Can also toll while clarifying fee issues